UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHARLES HILL, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. C00-4620 BZ **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In this action, Charles Hill is suing defendant United State of America ("Government") under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, for damages he suffered when his car was struck by a truck driven by John Curry, a United State Coast Guard employee.[1] This court has jurisdiction pursuant to 28 U.S.C. § 1346. On February 2, 2001, the Government certified pursuant to 28 U.S.C. § 2679(d) that Mr. Curry was acting within the scope of his employment with the Coast Guard at the time of the accident. Trial

[1] The parties have consented to the jurisdiction of a United States Magistrate Judge for all proceedings, including entry of final judgment, pursuant to 28 U.S.C. § 636(c).

commenced on April 22, 2002. The Government did not contest liability. The only issues before the court are whether the damages plaintiff seeks were caused by the accident and the measure of those damages. The government's liability under the FTCA is determined "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. See also Kangley v. U.S., 788 F.2d 533 (9th Cir. 1986). "Because plaintiff's accident occurred in California, this action is governed by California law." Yanez v. U.S., 63 F.3d 870, 872 (9th Cir. 1995). Having considered and weighed all the evidence and having assessed the credibility of the witnesses, I now make these findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

1. On February 23, 1999, plaintiff was injured when his Volkswagen was struck by a Chevrolet Blazer driven by Mr. Curry. Later that day, plaintiff began to experience neck pain, weakness in his left arm and other symptoms and went to the emergency room.[2] A traumatic cervical disc rupture was suspected so he underwent a Magnetic Resonance Imaging (MRI) scan. The MRI ruled out a disc rupture, but disclosed evidence of a preexisting arthritic degenerative condition in

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[2] Citing comments by Dr. Andrews in the fall of 1999 that plaintiff did not complain of pain in his right arm when Dr. Andrews saw him on February 24, 1999, the day after the accident, defendant argues that any pain Mr. Hill experienced in his right arm was not caused by the accident. Plaintiff did report right arm pain to his physical therapist on March 4, 1999, and there is no evidence of any intervening cause for this pain. I find that the preponderance of the evidence established that his right arm pain was caused by the accident.

his cervical spine. Prior to the accident, this arthritic condition had not caused plaintiff any problems. However, it both made him more vulnerable to the injuries he sustained in the accident, and made it more difficult for him to heal.

2. Plaintiff began a course of conservative treatment consisting primarily of a combination of pain medication, physical therapy and rest. In the first few months following the accident, the symptoms plaintiff experienced were severe and he received regular treatment. As his symptoms lessened, he took fewer medications and lessened his therapy. In the past year, he has undergone therapy when prescribed by his doctor as his symptoms have flared.

3. The medical treatment Mr. Hill received up until the time of trial, including the two MRIs and the EMG, the visits to the orthopedic surgeons and chiropractors, the physical therapy and the prescription medication, was reasonable and necessary to treat the symptoms he was experiencing as a direct result of the accident. See Graf v. Marvin Engh Truck Co., 207 Cal. App. 2d 550, 555 (1962). The cost of his medical treatment was $11,972.58.

4. Plaintiff currently experiences pain and related symptoms in his neck, head and arms. Plaintiff's medical expert testified that "he's probably as good as he's going to get." Plaintiff's future medical treatment is less certain. Dr. Jones, one of plaintiffs treating physicians, has opined that successful surgery may relieve him of some or all of his symptoms. The alternative is for plaintiff to continue to live with his symptoms and control them with medication and

therapy, at a cost of $1,000 - $3,000 a year for the rest of his life. Plaintiff has decided for the foreseeable future to opt for conservative treatment. Defendant failed to produce evidence as to the risks associated with surgery or the likelihood of its success. See Fontaine v. Nat'l R.R. Passenger Corp., 54 Cal. App. 4th 1519, 1531 n.12 (1997); McNary v. Hanley, 131 Cal. App. 188, 190 (1933). Under the circumstances, I find that plaintiff's election to continue with conservative treatment is reasonable. See, e.g., Dodds v. Stellar, 77 Cal. App. 2d 411, 423 (1947)("Where the benefits to be gained by the refusal of a person who has been injured through the negligence of another to undergo a serious operation are doubtful, such refusal may be found not unreasonable even though such operation be advised by a competent physician."); Garcia v. Bauer Dredging Co., Inc., 506 F.2d 19, 20 (5th Cir. 1975)(plaintiff not required to undergo surgery in order to mitigate his damages where doctors indicated that surgery offered no reasonable certainty of success). Dr. Thomas calculated the present value of that treatment, using a median cost of $2000 a year, at $56,000.[3]

5. At the time of the accident, plaintiff was working as an attorney practicing by himself. The injuries plaintiff sustained in the accident interfered with his ability to work in several ways. First, they caused him to hire attorneys, at

[3] Dr. Thomas used a life expectancy of 30 years. According to the BAJI table, plaintiff's life expectancy is 32 years. I have used Dr. Thomas' calculation since there is no other evidence before me and since the difference is not substantial.

a total cost of $12,465, to assist him with specific tasks which he was unable to perform because of his injuries. Second, they caused him to decline to accept, or to refer to other attorneys, cases which he testified he would have accepted but for his injuries. Third, his pain and related symptoms made it more difficult for him to work.

6. While there was some evidence that he declined or referred 25 cases between the accident and the trial, plaintiff only presented meaningful testimony with respect to 16 such cases. I conclude that the cases about which there was no detailed testimony were of such a nature that ascribing damages to them would be speculative.

7. In calculating plaintiff's lost earnings, I found generally credible and reliable the testimony of Mr. Hill, supported by Mr. Sterns, Mr. Witteman and Dr. Thomas, as to the value of the cases plaintiff declined or referred elsewhere. The attorneys testified to the sort of evaluation any experienced plaintiff's contingency lawyer must make in determining whether to accept a new case and defendant offered no evidence to the contrary. Those values are set forth on page 5 of plaintiff's Exhibit X.[4] I did not accept those values in 3 instances. As to Passos, I find that plaintiff did not establish by a preponderance of the evidence any damage suffered from that referral. The evidence is that when represented by Mr. Hill, Ms. Passos obtained a $250,000

[4] I did not consider significant the minor variations on some of the cases between Mr. Hill's testimony and the information in Exhibit X.

arbitration award, which would have netted Mr. Hill a $100,000 fee. Ms. Passos rejected the award and the case was referred to Mr. Sterns, one of the most prominent personal injury attorneys in San Francisco. Mr. Sterns testified that the case has a value of $750,000 to $1,000,000 and a high probability of success. Accepting Mr. Stern's expert opinion that the case is worth approximately $900,000 and that there is an 80% likelihood of success, the value of the case for damages purposes is $720,000. Since the attorneys' fee will be 40%, or $288,000, of which plaintiff will get 40%, his expected fee is $115,200. Thus, Mr. Hill has not proven damage since it appears that he will obtain a larger fee as a result of Mr. Sterns' intervention than he would have gotten on his own. Mr. Hill introduced no evidence which would establish that absent Mr. Sterns' intervention, the result on trial de novo would have differed from the $250,000 award he obtained for the plaintiff in arbitration. As to Listol, I valued Mr. Hill's lost earnings at $40,000 since Dr. Thomas appears to have neglected to account for the 20% referral fee Mr. Hill testified he is to receive. I also excluded the $37,750 attributed by Dr. Thomas to the "less defined cases" since, as I noted earlier, there was no significant testimony about the value or likelihood of recovery of any of those cases. I therefore calculate that Mr. Hill was precluded by the injuries he suffered in this accident from earning

$226,000 in fees. Multiplying this amount by 50%,[5] to account for the variable costs that would have been associated with obtaining those earnings, produces recoverable damages in the amount of $113,000.

8. Although there was some testimony that plaintiff expected to continue to lose earnings as a result of this accident, I find that plaintiff has failed to prove such damages with reasonable certainty. For example, there was no persuasive testimony that plaintiff's practice was "drying up" in the sense that he is no longer receiving referrals from other attorneys or from the bar association at the same rate as prior to the accident. Moreover, most of his referrals and declinations occurred in 1999 and there were few referrals or declinations in the year prior to trial. Based on this evidence, plaintiff has not proven that he will continue to have to refer or decline to accept a substantial number of cases in the future as a result of the injuries he sustained in this accident.

9. As a result of the accident, plaintiff experienced pain and suffering which prevented him, and will continue to prevent him, from fully participating in many significant life activities. In addition to work, discussed above, he has been significantly restricted in his ability to play and otherwise interact with his young children, an experience

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[5] I elected to use Dr. Thomas' 50% ratio, as opposed to Dr. Udinsky's 56% ratio, since I see no reason to exclude plaintiff's 1994 expense figures in determining the appropriate ratio, which seems to be the principal explanation for the difference.

which can never be replicated since children age. He has been significantly restricted in helping around the house, placing a disproportionate burden on his wife, and in playing tennis and golf. His pain has made him irritable around his family, when they ask him to engage in activities he could not endure. He has had difficulty sleeping and traveling in planes and cars.

10. Under California law, "[i]n cases alleging negligence, the proper test for proving causation is the one set out in BAJI No. 3.76 [citation omitted]: 'The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm.'" Espinosa v. Little Co. of Mary Hosp., 31 Cal. App. 4th 1304, 1313-14 (1995). See also Vickers v. U.S., 228 F.3d 944, 953-54 (2000) ("California applies the 'substantial factor' test of legal causation."); Mitchell v. Gonzales, 54 Cal. 3d 1041, 1052-54 (1991)(approving use of BAJI 3.76 in negligence actions). The accident was a substantial factor in bringing about all of plaintiff's medical injuries and subsequent damage discussed above.

11. I find that the plaintiff has established by a preponderance of the evidence, the reasonable certainty of the following damages:

1. Past medical expenses $11,972.58;

2. Future medical expenses..... $56,000;

3. Loss of earnings..... $113,000;

4. Payments to attorneys..... $12,465;

5. General damages..... $200,000.

Total..... $393,437.58

I have previously ruled that plaintiff's recovery is limited to the $324,000 he sought in his FTCA administrative claim. Accordingly, it is hereby ORDERED that judgment be entered in favor of plaintiff in the amount of $324,000 with interest and costs as permitted by law.

Dated: May 2, 2002

Bernard Zimmerman
United States Magistrate Judge

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